

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

TROY CAPITAL LLC,

Case No. 2:20-CV-205 JCM (DJA)

ORDER

V.

PATENAude & FELIX APC, et al.,

Defendant(s).

Presently before the court is defendant Kristopher Childers (“Childers”)’s motion to dismiss plaintiff’s complaint. (ECF No. 113). Plaintiff Troy Capital, LLC (“Troy”) filed a response (ECF No. 119), to which Childers replied (ECF No. 122).

Also before the court is defendant Ryan Johnson (“Johnson”) (with Childers, “defendants”)’s motion to dismiss plaintiff’s complaint. (ECF No. 116). Troy filed a response (ECF No. 120), to which Johnson replied (ECF No. 124).

I. Background

The instant action arises from debt collection services performed by Patenaude & Felix APC (“P&F”) for Troy. Troy retained P&F, a law firm, to collect on judgments in California and Arizona. (ECF No. 1). Childers and Johnson worked for P&F as associate attorneys at the time. (*Id.*) Allegedly, P&F failed to collect on some of the judgments, and Troy has brought suit against the law firm and several of its employee attorneys on a variety of contractual claims. (*Id.*) Troy purports to have served the complaint on Johnson and Childers by leaving copies with the paralegal for the P&F’s Nevada registered service agent. (ECF No. 1-5 at 3, 6). Johnson and Childers are both Arizona residents and are no longer employed at P&F. *See* (ECF No. 1-4 at 3).

1 Defendants now move to dismiss the complaint against them because of this alleged deficiency
 2 in service. (ECF Nos. 113; 116).

3 **II. Legal Standard**

4 “A federal court does not have jurisdiction over a defendant unless the defendant has
 5 been served properly under [Rule] 4.” *Direct Mail Specialists v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988); *see also Murphy Bros., Inc. v. Mitchell Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (“Service of process, under longstanding tradition in our system
 6 of justice, is fundamental to any procedural imposition on a named defendant.”). Where the
 7 validity of service is contested, the burden is on the party claiming proper service to establish its
 8 validity. *Cranford v. United States*, 359 F.Supp.2d 981, 984 (E.D.Cal. 2005) (citing *Grand
 9 Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993)).
 10 Assuming insufficiency of process or insufficiency of service of process, the Court has discretion
 11 to dismiss an action or simply quash service. *See e.g., SHJ v. Issaquah School District No. 411*,
 12 470 F.3d 1288, 1293 (9th Cir. 2006) (citing *Stevens v. Security Pac. Nat'l Bank*, 538 F.2d 1387,
 13 1389 (9th Cir.1976)) (“the choice between dismissal and quashing service of process is in the
 14 district court's discretion.”).

15 Rule 12(b)(5) allows a defendant to move to dismiss based on insufficient service. FED.
 16 R. CIV. P. 12(b)(5). This type of claim challenges the manner and method of service. *Id.* Without
 17 compliance with Rule 4, neither actual notice nor simply naming the defendant in the complaint
 18 will provide personal jurisdiction. *Direct Mail Specialists, Inc. v. Eclat Computerized Tech., Inc.*, 840 F.2d 685, 688 (9th Cir.1988).

19 **III. Discussion**

20 Defendants bring nearly identical motions to dismiss plaintiff's complaint for insufficient
 21 service of process. *See* (ECF Nos. 113; 116). Both argue that they are former employees of
 22 P&F and therefore P&F's agent was not authorized to accept service on their behalf. Troy
 23 responds by asserting that defendants have waived that defense by both failing to raise it in their
 24 initial Rule 12 motion and making other appearances in the case.

25
 26
 27
 28 . . .

1 a. Waiver

2 Federal Rule of Civil Procedure 12 prohibits a party from raising the defense of
 3 insufficient service of process if the party fails to include it in that party's first Rule 12 motion
 4 and that defense was available to the party. *See* FED. R. CIV. PRO. 12(g)(2), (h)(1).

5 Here, defendants raised the defense in their initial motion. Section VI of their initial Rule
 6 12(b) motion makes an abridged version of their argument in the instant motion. *See* (ECF No. 6
 7 at 23). At the time defendants raised this defense, it was premature, and as such, unavailable to
 8 them. *See, e.g., Rhodes v. Electronic Data Sys. Corp.*, No. CIV S-06-1715, 2006 WL 2830165,
 9 at *2 (E.D. Cal. Sept. 29, 2006). Troy, as it conceded in its response to the first Rule 12 motion,
 10 still had time to properly serve defendants. *See* (ECF No. 8 at 18–19). This court will not now
 11 punish defendants for Troy's failure to serve them pursuant to that concession.

12 Further, to the extent that defendants have entered other "appearances" in the case, this
 13 court does not find those appearances sufficient to justify waiver. The only appearances Troy
 14 points to are pleadings for the petition for removal to this court, the aforementioned 12(b) motion
 15 contesting personal jurisdiction, and pleadings to stay discovery while the court adjudicated that
 16 12(b) motion. *See* (ECF Nos. 1; 6; 12; 16). None of those pleadings waive an insufficiency of
 17 service defense since defendants raised the defense prematurely and have not filed any other
 18 responsive pleadings. *See* FED. R. CIV. PRO. 12(h)(1). Thus, defendants may raise a 12(b)(5)
 19 defense in their instant motions.

20 b. Sufficiency of Service

21 Troy's responses to defendants' motions do not contest the merits of the arguments at all.
 22 Troy never argues that service was sufficient. In this district, courts have held that parties
 23 concede to dismissal on that ground when they fail to address a portion of the moving party's
 24 argument. *See, e.g., Moore v. Ditech Fin., LLC*, No. 2:16-CV-1602-APG-GWF, 2017 WL
 25 2464437, at *2 (D. Nev. June 7, 2017), *aff'd*, 710 F. App'x 312 (9th Cir. 2018) (holding that the
 26 plaintiff "conceded to dismissal" of a claim "by failing to oppose the defendants' arguments on
 27 this point in their motion to dismiss" (emphasis added)). This, combined with Troy's own
 28 admission that it would arrange to have defendants "properly served" individually, bolsters

1 defendants' motions. *See* (ECF No. 8 at 18–19). The court grants defendants' motions and
2 dismisses Troy's complaint.

3 **IV. Conclusion**

4 Accordingly,

5 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Childers's motion to
6 dismiss (ECF No. 113) be, and the same hereby is, GRANTED.

7 IT IS FURTHER ORDERED that Johnson's motion to dismiss (ECF No. 116) be, and
8 the same hereby is, GRANTED.

9 DATED September 16, 2022.

10 
11 UNITED STATES DISTRICT JUDGE

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28